

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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UNITED STATES OF AMERICA, for the use
and benefit of WELLS CARGO, INC.,

Plaintiff(s),

v.

ALPHA ENERGY AND ELECTRIC, INC. et
al.,

Defendant(s).

Case No. 2:18-CV-1182 JCM (EJY)

AMENDED ORDER

Presently before the court is third-party defendant Southwestern Construction (“Southwestern”)’s motion for summary judgment. (ECF No. 206). Third-party plaintiff Alpha Energy and Electric (“Alpha”), and the case’s original defendant American Contractors Indemnity Company (“ACIC”) each filed a response (ECF Nos. 215; 218), to which Southwestern replied (ECF No. 227).

Third-party defendant Northcon, Inc. (“Northcon”) filed a notice of non-opposition and purports to join Southwestern’s motion. (ECF No. 221). Alpha filed a response opposing that purported joinder. (ECF No. 226).

I. Background

This matter arises from construction contracts between contractor Alpha, subcontractor Southwestern, and project manager Northcon for a project at the Nellis Air Force Base in Nevada. On June 28, 2018, plaintiff Wells Cargo, Inc. (“Wells Cargo”), filed the original claim in this matter against Alpha and against Alpha’s surety, ACIC.

1 On August 6, 2018, Alpha filed its third-party complaint against Southwestern and
2 Northcon. (ECF No. 6). Alpha alleges that the subcontract between Alpha and Southwestern
3 contains an indemnity provision wherein Southwestern indemnified Alpha for any damage
4 arising out of supplier claims. (*Id.* at 9). Alpha further alleges that the project management
5 contract between Alpha and Northcon required Northcon to manage, handle, review, and track
6 all payments for subcontractors working on the project. (*Id.* at 8).

7 According to Alpha, Southwestern breached its contract with Alpha by failing to pay one
8 of its suppliers, Wells Cargo, during the Nellis project. (*Id.* at 9). Alpha also alleges that
9 Northcon breached its contract by failing to properly manage payment requests and applications
10 under the Nellis project. (*Id.* at 8). Further, Alpha alleges that it is entitled to indemnification
11 from both Southwestern and Northcon for any judgment against Alpha in favor of Wells Cargo
12 in the underlying litigation. (*Id.* at 11).

13 On July 22, 2019, the court granted Wells Cargo's motion for summary judgment against
14 Alpha in the amount of \$134,814.76. (ECF No. 89). On August 19, 2019, ACIC and Wells
15 Cargo entered into a settlement agreement and agreed to a complete settlement. (ECF No. 91).
16 According to Alpha, the settlement amount is \$149,955.64. (*See* ECF No. 174 at 3). On
17 September 11, 2019, the parties stipulated to dismiss Wells Cargo as a party. (ECF No. 93).

18 Alpha made its initial disclosures to Southwestern and Northcon for its third-party action
19 on October 10, 2018. (ECF No. 170-1). Where Alpha was required to disclose its calculation of
20 damages, it provided an empty table listing "TBD" under the amount of damages. (*Id.* at 11).
21 On February 13, 2019, Alpha supplemented its initial disclosures, but again provided "TBD" for
22 the amount of damages. (ECF No. 170-2 at 12).

23 On December 12, 2019, Alpha again supplemented its disclosures, this time alleging
24 \$149,955.64 in special damages "[a]gainst Southwestern Construction, Inc. and Northcon, Inc.,"
25 as well as \$397,841.72 in special damages "[a]gainst Northcon, Inc." (ECF No. 170-4 at 11).
26 Alpha provided no calculation for these damages, and according to Southwestern, did not make
27 available any documents or other evidence upon which those damages were based. When
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1 discovery closed on February 11, 2020, Alpha had still not provided a calculation of damages or
2 any evidence supporting its damages.

3 Granting a motion by Southwestern and Northcon, the court then imposed discovery
4 sanctions precluding Alpha “from using any undisclosed and improperly disclosed evidence at
5 trial” to support a calculation of damages. (ECF Nos. 183; 201). Functionally, this order
6 prevents Alpha from disclosing evidence of any actual damages.

7 Southwestern now moves for summary judgment on all of Alpha’s claims against it,
8 arguing that since Alpha is precluded from offering evidence of damages, it cannot prevail on
9 any of its contractual claims. (ECF No. 206). Alpha contends that the availability of nominal
10 damages means Southwestern is not entitled to judgment as a matter of law. (ECF No. 215).

11 **II. Legal Standard**

12 The Federal Rules of Civil Procedure allow summary judgment when the pleadings,
13 depositions, answers to interrogatories, and admissions on file, together with the affidavits, if
14 any, show that “there is no genuine dispute as to any material fact and the movant is entitled to
15 judgment as a matter of law.” FED. R. CIV. P. 56(a). A principal purpose of summary judgment
16 is “to isolate and dispose of factually unsupported claims” *Celotex Corp. v. Catrett*, 477
17 U.S. 317, 323–24 (1986).

18 For purposes of summary judgment, disputed factual issues should be construed in favor
19 of the non-moving party. *Lujan v. Nat’l Wildlife Fed.*, 497 U.S. 871, 888 (1990). However, to
20 be entitled to a denial of summary judgment, the non-moving party must “set forth specific facts
21 showing that there is a genuine issue for trial.” *Id.*

22 In determining summary judgment, the court applies a burden-shifting analysis. “When
23 the party moving for summary judgment would bear the burden of proof at trial, it must come
24 forward with evidence which would entitle it to a directed verdict if the evidence went
25 uncontroverted at trial.” *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480
26 (9th Cir. 2000). Moreover, “[i]n such a case, the moving party has the initial burden of
27 establishing the absence of a genuine issue of fact on each issue material to its case.” *Id.*

1 By contrast, when the non-moving party bears the burden of proving the claim or
2 defense, the moving party can meet its burden in two ways: (1) by presenting evidence to negate
3 an essential element of the non-moving party's case; or (2) by demonstrating that the non-
4 moving party failed to make a showing sufficient to establish an element essential to that party's
5 case on which that party will bear the burden of proof at trial. *See Celotex Corp.*, 477 U.S. at
6 323–24. If the moving party fails to meet its initial burden, summary judgment must be denied
7 and the court need not consider the non-moving party's evidence. *See Adickes v. S.H. Kress &*
8 *Co.*, 398 U.S. 144, 159–60 (1970).

9 If the moving party satisfies its initial burden, the burden then shifts to the opposing party
10 to establish that a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v. Zenith*
11 *Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute, the
12 opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient
13 that “the claimed factual dispute be shown to require a jury or judge to resolve the parties’
14 differing versions of the truth at trial.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*,
15 809 F.2d 626, 630 (9th Cir. 1987).

16 In other words, the nonmoving party cannot avoid summary judgment by relying solely
17 on conclusory allegations that are unsupported by factual data. *See Taylor v. List*, 880 F.2d
18 1040, 1045 (9th Cir. 1989). Instead, the opposition must go beyond the assertions and
19 allegations of the pleadings and set forth specific facts by producing competent evidence that
20 shows a genuine issue for trial. *See Celotex*, 477 U.S. at 324.

21 At summary judgment, a court's function is not to weigh the evidence and determine the
22 truth, but to determine whether a genuine dispute exists for trial. *See Anderson v. Liberty Lobby,*
23 *Inc.*, 477 U.S. 242, 249 (1986). The evidence of the nonmovant is “to be believed, and all
24 justifiable inferences are to be drawn in his favor.” *Id.* at 255. But if the evidence of the
25 nonmoving party is merely colorable or is not significantly probative, summary judgment may be
26 granted. *See id.* at 249–50.

27 The Ninth Circuit has held that information contained in an inadmissible form may still
28 be considered for summary judgment if the information itself would be admissible at trial.

1 *Fraser v. Goodale*, 342 F.3d 1032, 1036 (9th Cir. 2003) (citing *Block v. City of Los Angeles*, 253
 2 F.3d 410, 418-19 (9th Cir. 2001) (“To survive summary judgment, a party does not necessarily
 3 have to produce evidence in a form that would be admissible at trial, as long as the party satisfies
 4 the requirements of Federal Rules of Civil Procedure 56.”)).

5 **III. Discussion**

6 The parties do not dispute any of Southwestern’s stated facts. (ECF No. 215 at 2). They
 7 dispute only that Southwestern is entitled to judgment as a matter of law. (*Id.*) Southwestern
 8 contends that Alpha’s lack of damages evidence entitles it to summary judgment on all claims.
 9 (ECF No. 206 at 4). However, Alpha argues that because it can assert a theory of nominal
 10 damages, Southwestern is not entitled to judgment, and this case should proceed to trial. (ECF
 11 No. 215 at 2).

12 The Nevada Supreme Court has endorsed nominal damages as viable recovery for breach
 13 of contract claims. *Gramanz v. T-Shirts & Souvenirs, Inc.*, 894 P.2d 342, 343 (Nev. 1995).

14 Alpha cites to two federal district court cases holding that a claim may survive summary
 15 judgment where a party has been limited to nominal damages but has not previously disclosed
 16 that theory of damages. *See SiteLock LLC v. GoDaddy.com LLC*, 562 F.Supp.3d 283, 298 (D.
 17 Ariz. 2022); *GeoMetWatch Corp. v. Hall*, No. 1:14-cv-00060-JNP, 2018 WL 6240991, at *16
 18 (D. Utah Nov. 27, 2018). Both of these cases were claims for trademark infringement under the
 19 Lanham Act. Trademark infringement does not require damages as an element of the claim.
 20 *SiteLock*, 562 F.Supp.3d at 296–297. A breach of contract action, on the other hand, *does*
 21 require damages as an element of the claim. *See Calloway v. City of Reno*, 993 P.2d 1259, 1263
 22 (Nev. 2001). As this court reads the case law, the courts in *SiteLock* and *GeoMetWatch* refused
 23 to grant summary judgment where only nominal damages were still available as a *remedy*.

24 Here, damages are a *requisite element* of a successful claim under the cause of action that
 25 nominal damages alone cannot satisfy. Interpreting California law, which statutorily enshrines
 26 nominal damages at Cal. Civ. Code § 3360, the Ninth Circuit has previously determined that
 27 there must be “a showing of appreciable and actual” damage for a breach of contract claim to be
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1 actionable. *See Aguilera v. Pirelli Armstrong Tire Co.*, 223 F.3d 1010, 1015 (9th Cir. 2000).
 2 This court is likewise persuaded.

3 While Nevada may recognize nominal damages, in the more than 1,500 days that this
 4 litigation has been pending, Alpha has not once mentioned a claim for nominal damages. It may
 5 not now do so to circumvent the discovery sanctions this court already imposed. *See Funk v.*
 6 *Belneftekheim*, No. 14-CV-376 (BMC), 2020 WL 7942868, at *6 (E.D.N.Y.). It has not
 7 disclosed nominal damages as a category of damages, and it has provided no authority indicating
 8 that such a failure is excusable where damages are fundamental element of the claim. Summary
 9 judgment for Southwestern is therefore appropriate.

10 Northcon purports to join Southwestern's motion for summary judgment. *See* (ECF No.
 11 221). Alpha argues that the joinder is procedurally improper under Federal Rule Civil Procedure
 12 56(c) and Local Rule 56-1. (ECF No. 226). However, a simple "me too" joinder does not
 13 prejudice Alpha. Northcon offers no new arguments or evidence that Alpha could not consider
 14 or respond to. It simply states, correctly, that any judgment rendered on Southwestern's motion
 15 should apply equally to Northcon given the posture of the case. Another district court in the
 16 Ninth Circuit has found that a similar joinder motion was appropriate. *See Star Ins. Co. v. Iron*
 17 *Horse Tools, Inc.*, No. CV 16-48-BLG-SPW-TJC, 2018 WL 3079493, at *5 (D. Mont. Feb. 7,
 18 2018).

19 Here, as Alpha concedes, there are no questions of fact. (ECF No. 215 at 2). The only
 20 contested issue is whether, as a matter of law, Alpha's claims survive its inability to provide any
 21 evidence of damages. (*Id.*) The court has determined that the claims do not survive. Northcon's
 22 joinder, which requests summary judgment relief for itself, is an appropriate vehicle to bring that
 23 discrete legal question before the court. The court finds Northcon's joinder appropriate and
 24 grants Northcon summary judgment as well.

25 Finally, ACIC contends that it is improper for the court to grant summary judgment
 26 against Alpha because of ACIC's relationship to Alpha as a surety. (ECF No. 218).
 27 Southwestern and Northcon do not seek summary judgment against ACIC; they seek summary
 28 judgment against Alpha. (ECF Nos. 206; 221). ACIC provides an inapposite Nevada Supreme

1 Court case in support of its position but provides no authority arising under the federal cause of
2 action at issue here, the Miller Act. *See* (ECF No. 218).

3 Southwestern moved for summary judgment on Alpha's claims (ECF No. 206), which
4 requires proof of damages. *See Calloway*, 993 P.2d at 1263. Due to Alpha's previous conduct in
5 this litigation, this court imposed a discovery sanction that has precluded it from offering
6 evidence of those damages. (ECF Nos. 183; 201). Therefore, there is no way for Alpha to
7 prevail on its claims against Southwestern and Northcon. Put another way: "there is no genuine
8 dispute as to any material fact and the movan[s] [are] entitled to judgment as a matter of law" on
9 all claims Alpha has asserted against them because Alpha cannot prove its damages. FED. R.
10 Civ. P. 56(a).

11 **IV. Conclusion**

12 Accordingly,

13 IT IS HEREBY ORDERED, ADJUDGED, and DECREED that Southwestern's motion
14 for summary judgment (ECF No. 206) be, and the same hereby is, GRANTED.

15 IT IS FURTHER ORDERED that Northcon's motion in limine regarding Alpha's
16 documentary evidence (ECF No. 203) be, and the same hereby is, DENIED, as moot.

17 The clerk is instructed to enter judgment in favor of Southwestern and Northcon on all
18 claims brought against them by Alpha.

19 DATED October 12, 2022.

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21 UNITED STATES DISTRICT JUDGE
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